No. 14-1520

IN THE

Supreme Court of the United States

STRYKER CORPORATION, STRYKER PUERTO RICO, LTD., AND STRYKER SALES CORPORATION,
Petitioners,

v.

ZIMMER, INC. AND ZIMMER SURGICAL, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions on which Petitioner seeks certiorari mischaracterize the Federal Circuit's law. The questions assert that the Federal Circuit improperly imposes a "rigid" test for the award of enhanced damages under 35 U.S.C. § 284. Rather, the Federal Circuit follows this Court's guidance by requiring parties to prove willful infringement, objectively assessed, as a prerequisite to an award of punitive, enhanced damages.

Accordingly, a more accurate representation of the questions presented is:

1. Has the Federal Circuit failed to properly follow this Court's guidance by interpreting 35 U.S.C. § 284 as requiring a party to prove willful infringement, objectively assessed, to win punitive, enhanced damages?

2. Does a district court have discretion under 35 U.S.C. § 284 to award punitive, enhanced damages, regardless of whether a party willfully infringed?

PARTIES TO THE PROCEEDING

The caption identifies all parties.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Zimmer, Inc. and Zimmer Surgical, Inc. state that Zimmer Surgical, Inc. is wholly owned directly and indirectly by Zimmer Inc., and that Zimmer, Inc. is wholly owned directly and indirectly by Zimmer Biomet Holdings, Inc. More than 10% of the stock of Zimmer Biomet Holdings, Inc. is held by a consortium of private equity funds affiliated with four investment firms, two of which, the Blackstone Group L.P. and The Goldman Sachs Group, Inc., are publicly traded.

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Zimmer, Inc. and Zimmer Surgical, Inc. (collectively "Respondent") respectfully file this opposition to the petition for a writ of certiorari filed by Stryker Corporation, Stryker Puerto Rico, LTD., and Stryker Sales Corporation (collectively "Petitioner").

I. PRELIMINARY STATEMENT

Petitioner asks this Court to depart from its normal practice by considering issues that the court of appeals did not. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). The Federal Circuit neither considered nor decided the questions Petitioner presents, so this Court should decline their review.

In fact, Petitioner previously renounced its first question presented. Petitioner there asks this Court to consider whether the willfulness requirement and the two-part test announced in *In re Seagate Technology, LLC*, 497 F.3d 1360, 1370-71 (Fed. Cir. 2007) (en banc), improperly constrain district courts from enhancing damages under 35 U.S.C. § 284. But Petitioner explicitly waived such a challenge at the Federal Circuit. Petitioner wrote: "[Petitioner] *does not challenge* on appeal the correctness of the two-prong, objective/subjective inquiry for willfulness set forth in *In re Seagate Technology* . . . ." App. 182a (emphasis added). Accordingly, the Federal Circuit did not consider the issue. For at least this reason, the petition should fail. *See, e.g.*, *Meyer v. Holley*,

537 U.S. 280, 291 (2003) ("[I]n the absence of consideration of that matter by the Court of Appeals, we shall not consider it."). And this Court should follow its ordinary practice and allow these relatively new questions to percolate further at the Federal Circuit.

Petitioner raises other arguments that it failed to present below. For example, Petitioner asserts that the *Read* factors, *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 826-28 (Fed. Cir. 1992), should guide a district court's willfulness decision. Pet. 32-34. Petitioner contrives this new challenge before this Court, never having asserted it below at any stage.

Finally, Petitioner asserts that the appellate court should review a district court's determination under the objective prong of willful infringement with deference. Pet. 34-37. But this challenge also fails to present an appropriate issue for review. As the Federal Circuit explained, its decision did not implicate the standard of review because the district court erred under either standard:

> This court has not yet addressed whether *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 188 L. Ed. 2d 816 (2014), or *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1746, 188 L. Ed. 2d 829 (2014), altered the standard of review under which this court analyzes the objective prong of willfulness. However, as the district court failed to undertake any objective assessment of

> [Respondent]'s specific defenses, the district court erred under any standard of review and thus this court need not now address what standard of review is proper regarding the objective prong of willfulness.

App. 22a n.6. For this reason, this case presents a poor vehicle to consider the appropriate standard of appellate review.

In any event, *Octane* and *Highmark* do not undermine the Federal Circuit's de novo review of the district court's objective-willfulness finding, as Petitioner suggests. *Octane* and *Highmark* addressed the proper test and standard of review for awarding attorney's fees for exceptional cases under 35 U.S.C. § 285. The issue in this case is enhanced damages under § 284. These issues are fundamentally different and dictate different governing tests and standards of review. Attorney's fees are compensatory, but enhanced damages are punitive. In *Octane*, this Court explained that compensatory attorney's fees may be awarded under § 285 for merely "unreasonable" litigation conduct. *Octane*, 134 S. Ct. at 1755-56. Unreasonable conduct is not enough, however, for punitive enhanced damages under § 284. Rather, as this Court explained over a century ago, punitive or enhanced damages require willful infringement. *Seymour v. McCormick*, 57 U.S. 480, 488-89 (1853). And willfulness requires reckless behavior, which this Court has held requires "conduct violating an

objective standard." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 68-69 (2007); *Seagate*, 497 F.3d at 1370-71 (citing *Safeco* for the proposition that recklessness is judged against an objective standard). Since this Court in *Highmark* changed the appellate standard of review based on its concurrent decision in *Octane* to eliminate the objective/subjective test for attorney's fees, *Highmark*, 134 S. Ct. at 1748-49, it follows that these cases do not dictate the standard of review under § 284, which is properly judged against an objective/subjective standard.

Finally, Petitioner's proposed changes would also undercut the Federal Circuit's ability to bring uniformity to patent law. Petitioner's changes would increase the variability in willfulness judgments between districts and encourage forum shopping. And the changes will force small companies to settle when they are unable to bear the risk of large judgments, such as the one hundred forty million dollar punitive judgment levied against Respondent below.

II. REASONS FOR DENYING THE PETITION

A. This Case Is a Poor Vehicle for Supreme Court Review of Enhanced Damages Under § 284

1. Petitioner Waived Challenge to the Two-Part Willfulness Test for Enhanced Damages at the Federal Circuit

The Federal Circuit did not opine on either of Petitioner's questions presented. And Petitioner waived challenge to willfulness and *Seagate*'s two-part test. Petitioner did not raise these challenges in any of its appeal briefs, letters, or motions before the Federal Circuit panel. Nor did Petitioner present its position at oral argument. Rather, as Petitioner explained, it asked the panel to focus exclusively on the standard of review:

> [Petitioner] *does not challenge* on appeal the correctness of the two-prong, *objective/subjective inquiry* for *willfulness* set forth in *In re Seagate Technology, LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc) because [Petitioner] prevailed on willfulness below even under the stringent standard set forth therein. Rather, [Petitioner] submits that de novo review of the objective prong of willfulness under *Bard* would be improper.

App. 182a (emphases added). Petitioner thus "d[id] not challenge" the willfulness requirement or the substantive enhanced-damages test, but only challenged appellate deference of findings under that test.

After the panel held that Respondent did not willfully infringe, Petitioner requested en banc rehearing. Petitioner presented several new questions for en banc review, including questions paralleling those it now presents. But Petitioner waited too long to submit these questions for Federal Circuit review, as a party cannot raise a new argument in its petition for rehearing en banc. *See, e.g.*, *Haas v. Peake*, 544 F.3d 1306, 1308 (Fed. Cir. 2008) ("Because Mr. Haas failed to raise [a statutory-construction] argument in his brief on appeal, despite the Veterans Court's ruling that the statute was ambiguous and despite otherwise extensive briefing on the issue of statutory interpretation, the argument has been waived."); *Pentax Corp. v. Robison*, 135 F.3d 760, 762 (Fed. Cir. 1998) ("Just as this court will not address issues raised for the first time on appeal or issues not presented on appeal, we decline to address the government's new theory raised for the first time in its petition for rehearing."). The Federal Circuit never reached Petitioner's questions and denied its petition for rehearing en banc.

"Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes*, 398 U.S. at

147 n.2; *Meyer*, 537 U.S. at 291 ("[I]n the absence of consideration of that matter by the Court of Appeals, we shall not consider it."); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998). Because the Federal Circuit has neither heard nor decided how *Octane* and *Highmark* affect enhanced damages under § 284, the Court should allow these issues to percolate further in the Federal Circuit. *See, e.g.*, *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

2. The Federal Circuit Determined that En Banc Review in This Case Was Not Appropriate

Before the panel, Petitioner challenged the standard of review for the objective prong of willfulness. But the Federal Circuit already determined that Petitioner's challenge to the standard of review would not alter the ultimate outcome in the case. Under *Seagate*'s objective-recklessness test—challenge to which Petitioner waived—the district court applied the wrong law. As the panel explained, the district court "failed to undertake an objective assessment of [Respondent]'s specific defenses to [Petitioner]'s claims," as *Seagate* requires. App. 22a. So the district court erred under

any standard. *See Highmark*, 134 S. Ct. at 1748 n.2 ("The abuse-of-discretion standard does not preclude an appellate court's correction of a district court's legal or factual error: 'A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law . . . .'" (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990))). Thus, the Federal Circuit explained, "as the district court failed to undertake any objective assessment of [Respondent's] specific defenses, the district court erred under any standard of review and thus this court *need not now address* what standard of review is proper regarding the objective prong of willfulness." App. 22a n.6 (emphasis added). Because Petitioner's challenge to the standard of review would not change the outcome of the case, the Federal Circuit declined to consider the issue in this case. And because the appellate court neither heard nor decided the issue, this Court should also decline to consider the issue in this case. *See, e.g.*, *Adickes*, 398 U.S. at 147 n.2.

Petitioner wrongly portrays the Federal Circuit as "unwilling to reconsider" the effects of *Octane* and *Highmark* on § 284. Pet. 20. But while the cases before the Federal Circuit thus far have been poor vehicles for en banc review, the Federal Circuit has expressed much interest in this issue, indicating that it will ultimately consider the issue in the appropriate case. Indeed, at least six Federal Circuit Judges have acknowledged the importance of these questions. And not one Federal Circuit Judge has expressed disinterest or an "unwilling[ness]" to

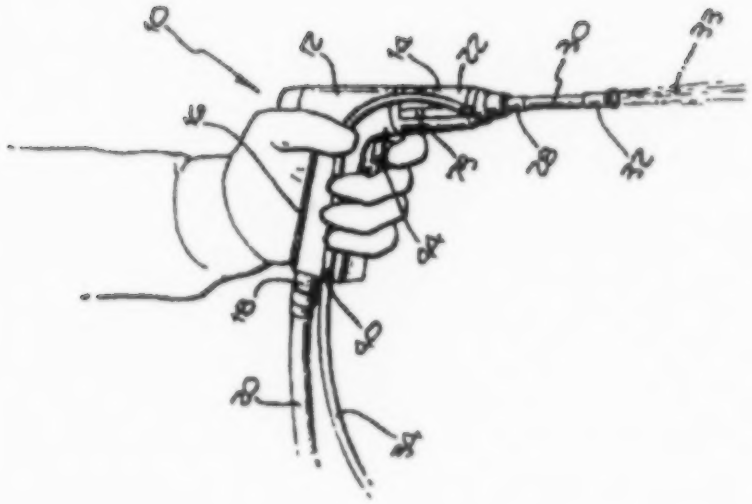
reconsider these issues, as Petitioner suggests. For example, in *Halo Electronics*, Judge Taranto, concurring in the denial of Halo's petition and joined by Judge Reyna, explained that while *Octane* and *Highmark* present questions ripe for review, Halo's petition failed to raise them. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 780 F.3d 1357, 1360 (Fed. Cir. 2015) (Taranto, J., concurring). Judge O'Malley, joined by Judge Hughes, also indicated an interest in "reevaluat[ing] our jurisprudence governing an award of enhanced damages under 35 U.S.C. § 284." *Id.* at 1361 (O'Malley, J., dissenting). Finally, in this case, Judges Prost, Newman, and Hughes acknowledged that the appellate court has "not yet" revisited the standard of review for enhanced damages in light of *Octane* and *Highmark*, revealing the court's intent to ultimately do so in the appropriate case. App. 22a n.6. As such, this Court should deny Petitioner's request and allow these issues to percolate further in the appellate court.

B. In Any Event, the Court Should Deny the Petition

1. The Appellate Court's Decision Was Correct

a. Petitioner and Its Patents

Petitioner's patents are all directed to a "pulsed lavage" device that squirts pulsed fluid (e.g., saline) from a plastic gun-shaped handpiece to clean an operating site:



Pat. 4,583,531, Fig. 1 (issued Apr. 22, 1986, to Mattchen). The invention falls within a crowded, heavily patented technological field.

Petitioner's first patent, U.S. Patent No. 6,022,329 ("the '329 patent"), issued in February 2000. In that same year, Petitioner sued a different manufacturer of pulsed lavage devices for infringing the '329 patent, and Petitioner's employees inspected and tested Respondent's devices later accused in this lawsuit. App. 5a. But it was not until 2010, nearly a decade later, that Petitioner actually sued Respondent for infringement of the patents-in-suit. *See id.* Indeed, it was not until Respondent invested ten years in the accused products and Respondent's customers (physicians) grew accustomed to those products that Petitioner filed suit.

After a jury trial, the district court awarded Petitioner over two hundred forty-eight million dollars in damages, of which only seventy million dollars compensated for lost profits. App. 50a, 120a-

122a. Even with the ten-year delay and the existence of objectively reasonable defenses to each of Petitioner's claims of infringement, the Court awarded Petitioner treble damages of over one hundred forty million dollars. App. 121a.

b. Respondent's Defenses

In both the district court and on appeal, Respondent presented reasonable defenses to Petitioner's claim that Respondent infringed three patents. With respect to the first, the '329 patent, Respondent asserted that the district court's judgment was based on an erroneous construction of the claim term "handle" and that, under that construction, it did not infringe. App. 8a-9a. Respondent explained that the district court construed the "handle" of the gun-like handpiece to include the barrel, App. 8a, notwithstanding that Petitioner had specifically defined the handle as being distinct from the barrel in the patent specification, *see* App. 9a:

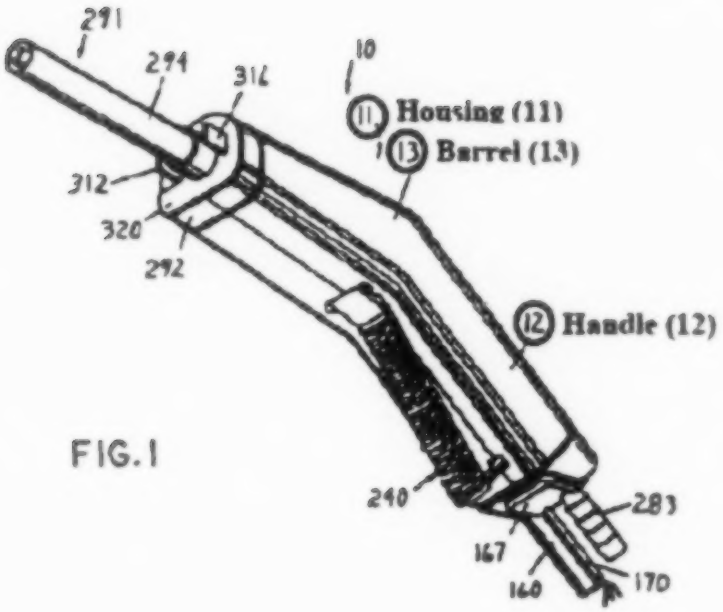


FIG. 1

'329 patent, Fig. 1 (annotations added). Indeed, Petitioner had argued that the handle was distinct from the barrel in its communications with the U.S. Patent and Trademark Office ("PTO") to distinguish prior patents in this crowded field and thus convince the PTO to grant its patent. App. 10a.

Against the second patent, U.S. Patent No. 6,179,807 ("the '807 patent"), Respondent also argued that the district court erred in granting summary judgment of infringement of the '807 patent. App. 13a-17a. Respondent explained that the court not only misconstrued the claim term "receive" but also ignored material facts regarding whether the accused handpieces "receive" the associated tip. App. 14a. In the context of mechanical inventions involving the male-female type of connections disclosed in the patent specification, Respondent explained that the word

"receive" means more than merely coupling or attaching. *Id.* Moreover, the specification discloses that it is important that the handpieces "receive" or act as a container for the tip (and not the other way around) for a specific reason: to prevent clogging. '807 patent col. 11 ll. 29-34. But in Respondent's accused devices, the tip "receives" the handpiece, the opposite of what was required by Petitioner's patent claims. Because infringement requires that the accused product include every claim element and Respondent's devices did not include every element, the district court erred in granting summary judgment of infringement.

Respondent also asserted that it could not infringe the '807 patent because it was invalid. App. 16a-17a. To prove infringement, Petitioner proffered a broad construction of the claim term "lock assembly." *See* App. 17a. The district court did not, however, hold Petitioner to that same claim construction when analyzing validity. *See* App. 16a-17a.

Finally, Respondent asserted that Petitioner's third patent, U.S. Patent No. 7,144,383 ("the '383 patent"), was invalid as obvious. App. 18a. Respondent relied on the same prior patents used by the PTO to reject nearly identical claims in a related patent application filed by Petitioner. *See* App. 19a. The only difference between the '383 patent claims and the prior patent was that the claims required an electric motor whereas the prior patent used a pneumatic motor. App. 18a. Because substituting a

pneumatic motor with an electric one involves only routine skill and yields fully predictable results, Respondent asserted that no reasonable jury could conclude that the '383 patent was not obvious. App. 18a-19a. At a minimum, Respondent's defenses to Petitioner's infringement claims were not objectively unreasonable and the district court should not have awarded punitive damages of over one hundred forty million dollars.

Indeed, the Federal Circuit repeatedly noted that Petitioner narrowly succeeded on its claims. As to the '807 patent, the Federal Circuit explained that it was "a close case" between the parties' positions. App. 16a. And as to the '329 patent, the court stated that "[Respondent]'s claim construction and non-infringement positions were not unreasonable." App. 13a.

c. The District Court's Decision and the Appellate Court's Reversal on Enhanced Damages

The district court nonetheless concluded that Respondent's defenses were objectively unreasonable and trebled Petitioner's seventy-million-dollar lost-profit award under 35 U.S.C. § 284. App. 119a. In doing so, the district court failed to apply the objective prong of the two-part test set forth in *Seagate*. As the Federal Circuit explained:

> The district court failed to undertake an objective assessment of [Respondent]'s specific defenses to [Petitioner]'s claims. Instead, the district court's analysis of objective reasonableness summarily asserted that the "jury heard testimony" that [Respondent] "all but instructed its design team to copy [Petitioner]'s products." The district court further concluded that the "pioneering" nature of [Petitioner]'s inventions and the secondary considerations of non-obviousness "made it dramatically less likely that [Respondent]'s invalidity arguments were reasonable."
>
> An objective assessment of the case shows that [Respondent] presented reasonable defenses to all of the asserted claims of [Petitioner]'s patents.

App. 22a-23a (citations omitted). Because the district court failed to analyze the objective prong for willfulness, the Federal Circuit held that it erred under any standard of review. App. 22a n.6. Moreover, because Respondent's defenses were objectively reasonable, the Federal Circuit correctly concluded that Respondent did not willfully infringe and Petitioner was not entitled to over one hundred forty million dollars in punitive damages. App. 23a-24a.

2. The Willfulness Test for Enhanced Damages Is Based on Long-Standing Supreme Court Precedent

Petitioner's challenge to the willfulness requirement sets aside over a century of precedent. Petitioner argues that § 284 as broadly written does not expressly refer to willful infringement. Pet. 3. But an award of up to three times enhanced damages on top of compensatory damages was first introduced into American patent law by the Patent Act of 1836, ch. 357, 5 Stat. 117, § 14 (1836), and has regularly required a showing of willful and wanton infringement, as demonstrated below. And none of the prior versions of § 284 expressly required "willful infringement" either, as Petitioner concedes. Pet. 11.

Yet the willfulness requirement existed then as now. This Court examined the requirement in 1856, explaining that the Patent Act of 1836 granted judges "power to inflict vindictive or punitive damages," but noted that "there is no good reason why taking a man's property in an invention should be trebly punished . . . [unless] the injury is wanton or malicious." *Seymour*, 57 U.S. at 488-89. As the en banc Federal Circuit in *Seagate* explained, "that an award of enhanced damages requires a showing of willful infringement" is a "well-established standard [that] accords with Supreme Court precedent." *Seagate*, 497 F.3d at 1368 (citing *Aro*

Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 508 (1964) (enhanced damages under 35 U.S.C. § 284 were available for willful or bad-faith infringement); *Dowling v. United States*, 473 U.S. 207, 227 n.19 (1985) (enhanced damages under 35 U.S.C. § 284 are available for "willful infringement"); *Seymour*, 57 U.S. at 489).

Similar to this Court's 1853 decision in *Seymour*, other pre-1952 circuit-court cases also required a showing of willful and wanton conduct to justify enhanced or punitive damages in patent cases. *See, e.g., Power Specialty Co. v. Conn. Light & Power Co.*, 80 F.2d 874, 878 (2d Cir. 1936) ("There is no justification for punitive damages here as upon wanton, deliberate, and willful infringement."); *Baseball Display Co. v. Star Ballplayer Co.*, 35 F.2d 1, 4 (3d Cir. 1929) ("[B]ecause of the deliberate and willful infringement, [patentee should also receive] punitive damages in 50 per cent. of the actual."); *W.S. Godwin Co. v. Int'l Steel Tie Co.*, 29 F.2d 476, 478 (6th Cir. 1928) (reversing and enhancing damages because "[w]e consider that the reasonable royalty found by the District Court should be doubled by the way of increased damages on account of this willful infringement"); *Filer & Stowell Co. v. Diamond Iron Works*, 270 F. 489, 490 (7th Cir. 1921) (Because "the infringement [was] properly found to have been flagrant and willful, the District Court was further warranted in increasing the damages as it did . . . ."). Likewise, circuit-court cases decided after 1952 consistently treated enhanced damages as a punitive provision, requiring willfulness. *E.g.*,

Union Carbide Corp. v. Graver Tank & Mfg. Co., 282 F.2d 653, 675 (7th Cir. 1960) ("[I]t is only on the basis of conscious and wilful infringement that exemplary or punitive damages are allowed in addition to those which are compensatory."); *Wilden Pump & Eng'g Co. v. Pressed & Welded Prods. Co.*, 655 F.2d 984, 988-90 (9th Cir. 1981) (reversing the district court's determination "that the appellants' infringement was willful, intentional and deliberate, and therefore subject to an award of increased damages pursuant to 35 U.S.C. § 284"); *Eltra Corp. v. Basic Inc.*, 599 F.2d 745, 758 (6th Cir. 1979) ("These facts simply do not make out a wilful infringement so that there was no basis whatever on which to award damages in excess of those intended to compensate Basic for its loss.").

Thus, when Congress re-enacted the enhanced-damages provision without substantive change in 1952, *Aro*, 377 U.S. at 505 n.20, it understood full well that willful infringement is required for an award of enhanced damages. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ."); *see also* Section II.B.4, *infra*.

3. *Octane* and *Highmark* Do Not Alter the Test or Standard of Review for Objective Willfulness

Further, contrary to Petitioner's argument, Pet. 20-21, 34-36, *Octane* and *Highmark* do not change the objective prong or standard of review for the objective prong of willful infringement as announced in *Bard Peripheral Vascular, Inc. v. W.L. Gore & Associates, Inc.*, 682 F.3d 1003 (Fed. Cir. 2012). *Octane* and *Highmark* addressed, respectively, the proper test and standard of review for awarding attorney's fees for exceptional cases under § 285, not enhanced damages under § 284. Sections 285 and 284 are different statutory provisions, and changing the analysis and standard of review for one should not dictate the analysis or standard of review for the other. Whereas § 285 attorney's fees are compensatory, § 284 enhanced damages are punitive. *Compare Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1347 (Fed. Cir. 2004) (en banc) ("Attorney fees are compensatory . . . ."), *with Root v. Ry. Co.*, 105 U.S. 189, 196 (1881) ("[T]he Patent Act of 1836 confined the jury to the assessment of actual damages, leaving it to the discretion of the court to inflict punitive damages to the extent of trebling the verdict."), *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507 (2008) (listing 35 U.S.C. § 284 among punitive-damages statutes), *and Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 648 n.11 (1999) ("Under the Patent

Remedy Act, States are subject to all the remedies available to plaintiffs in infringement actions, which include punitive damages and attorney's fees, see 35 U.S.C. §§ 284, 285 . . . ."). This Court in *Octane* emphasized that compensatory attorney's fees may be awarded for merely "unreasonable" litigation conduct. *Octane*, 134 S. Ct. at 1755-56. For punitive enhanced damages under § 284, however, unreasonable conduct is not enough since, as discussed above, this Court has repeatedly recognized that enhanced damages are only allowed for willful infringement.

As this Court has explained, willfulness is synonymous with "actions in 'reckless disregard' of the law" and requires "conduct violating an objective standard." *Safeco*, 551 U.S. at 57, 68-69; *Seagate*, 497 F.3d at 1371 (citing *Safeco* and noting that willfulness requires "that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent"). Because *Safeco* imposes an objective standard for willful behavior, and *Safeco* is a case that was neither expressly nor implicitly overruled by *Octane* or *Highmark*, the totality-of-the-circumstances test that this Court articulated in *Octane* (which eliminated the stand-alone objective test for § 285 attorney's fees) does not apply to § 284 enhancement analyses. Moreover, *Highmark*'s instruction to review § 285 attorney's fees only for an abuse of discretion does not implicate the standard of review under § 284 because *Highmark*'s holding was predicated on the changed exceptional-case test in

Octane, which no longer includes a stand-alone objective test. *Highmark*, 134 S. Ct. at 1748 (explaining that because, under *Octane*, "the determination whether a case is 'exceptional' under § 285 is a matter of discretion," it follows that "the exceptional-case determination is to be reviewed only for abuse of discretion").

Subjective considerations have no place in the objective prong, contrary to Petitioner's assertions. Pet. 28-31. The objective prong considers the objective likelihood that a party infringed a valid patent; it essentially assesses a party's defenses to infringement and invalidity. *See Safeco*, 551 U.S. at 69 ("It is [a] high risk of harm, objectively assessed, that is the essence of recklessness at common law."); *Seagate*, 497 F.3d at 1371. But neither defense implicates an infringer's state of mind. Infringement asks whether an accused product includes each element of a patent's claims. And copying "is of no import on the question of whether the claims of an issued patent are infringed." *Allen Eng'g Corp. v. Bartell Indus., Inc.*, 299 F.3d 1336, 1351 (Fed. Cir. 2002); *see also Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 35-36 (1997) (holding that "intent plays no role in the application of the doctrine of equivalents"). Similarly, invalidity does not turn on an infringer's state of mind. While copying in the market (including the alleged infringer) is a secondary consideration of nonobviousness, an infringer's copying holds no more weight than any other competitor's acts. *See, e.g., Geo. M. Martin Co. v. Alliance Mach. Sys. Int'l LLC*,

618 F.3d 1294, 1305 (Fed. Cir. 2010) ("[A] showing of copying is only equivocal evidence of non-obviousness in the absence of more compelling objective indicia of other secondary considerations." (citation omitted)). Thus, Petitioner's suggestion that an objective risk of harm should include a party's subjective intent has no basis.

Petitioner's proposed replacement of the current test also fails. Pet. 32-34. Petitioner suggests that the factors announced in *Read*, 970 F.2d at 826, could serve as a proper test for willfulness. Pet. 32-34. But *Read* does not provide the test for willfulness; *Read* provides instead a test for whether to enhance damages after willfulness is found. *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 859 (Fed. Cir. 2010), *aff'd*, 131 S. Ct. 2238 (2011) ("The test for willfulness is distinct and separate from the factors guiding a district court's discretion regarding enhanced damages.") (comparing *Seagate*, 497 F.3d at 1371, with *Read*, 970 F.2d at 826-27).

4. Appellate Courts Properly Review De Novo a Party's Objective Risk of Harm

The Federal Circuit's de novo review of the objective prong is supported by the law. The objective prong is not purely a question of law or fact. *Bard*, 682 F.3d at 1006-08. When an "issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a

matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

Huge punitive awards deserve appellate scrutiny. As this Court noted in *Pierce*, when a district court's disposition of an issue has substantial monetary consequences, that issue should be "reviewed more intensively." *Pierce v. Underwood*, 487 U.S. 552, 563 (1988). Enhanced damages cases "frequently involve extraordinarily large awards." *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 701 F.3d 1351, 1355 (Fed. Cir. 2012) (Dyk, J., concurring). Some awards in patent cases have topped one billion dollars because of punitive damages. *See, e.g.*, Final Judgment, *Carnegie Mellon Univ. v. Marvell Tech. Grp., Ltd.*, No. 2:09-cv-00290 (W.D. Pa. May 7, 2014), ECF No. 948 (awarding plaintiffs over 1.2 billion dollars). Indeed, one hundred forty million dollars hangs in the balance in this case. Massive punitive verdicts like these deserve close review by an appellate court.

Petitioner reasons that because this Court determined that "the district court is better positioned to decide whether a case is exceptional because it lives with the case over a prolonged period of time," this Court should hold the same for the objective prong of willfulness. Pet. 18 (quoting *Highmark*, 134 S. Ct. at 1748-49). But this conclusion does not necessarily follow. Unlike exceptional-case determinations, which focus on the

totality of the circumstances (including conduct during proceedings in the trial court), the objective prong focuses on whether a particular defense is objectively reasonable. Compared to district court judges who might preside over patent cases rarely or occasionally, Federal Circuit judges are better positioned to determine if a defense is objectively reasonable.

In fact, the choice of district court can tremendously affect a willfulness outcome. One scholar found that the outcome for a willfulness determination varies "from a high of over 50% in the Eastern District of Texas (52.3%) to approximately 27% in the District of Minnesota." Christopher B. Seaman, *Willful Patent Infringement and Enhanced Damages After In re Seagate: An Empirical Study*, 97 Iowa L. Rev. 417, 451 (2012).

De novo appellate review of the objective prong provides consistent application of willfulness standards and precedents. Consistent review prevents one or two particularly favorable courts from becoming plaintiffs' preferred venues. Indeed, Congress specifically created the Federal Circuit to eliminate regional variances in the application of patent law. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 390 (1996) ("It was just for the sake of such desirable uniformity that Congress created the Court of Appeals for the Federal Circuit as an exclusive appellate court for patent cases, observing that increased uniformity would 'strengthen the United States patent system in such

a way as to foster technological growth and industrial innovation.'" (quoting H.R. Rep. No. 97-312, at 20-23 (1981))). Consistency is particularly important with punitive damages so that one can "look ahead with some ability to know what the stakes are in choosing one course of action or another." *Exxon Shipping*, 554 U.S. at 502.

5. The Enhanced-Damages Framework Is Consistent with the Text of § 284

The Federal Circuit's treatment of enhanced damages is consistent with the plain language of the statute, contrary to Petitioner's assertion that the willfulness requirement renders the word "may" in § 284 inoperative. Pet. 20-21. Discretion conferred by statute with the word "may" "is rarely without limits." *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 (1989); *see Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005). Often, courts may exercise discretion only after certain conditions are met. The context of the statutory provision determines these conditions. So the word "may" does not automatically grant district courts unfettered power to treble damages, as Petitioner asserts. Nor does the word "may" "mean that no legal standard governs that discretion." *Martin*, 546 U.S. at 139. Instead, "may" permits district courts to award enhanced damages in some cases, but not all.

Under the current framework, "willfulness is necessary for, but does not compel, enhancement." *Halo Elecs.*, 780 F.3d at 1359 n.1 (Taranto, J.,

concurring). The framework permits a district court to enhance damages up to three times against a willful infringer, though it may choose not to enhance damages at all. That decision hinges on several factors, but is "committed to the discretion of the trial court." *Read*, 970 F.2d at 826. But against a nonwillful infringer, the district court must not treble damages. *See, e.g.*, *Seymour*, 57 U.S. at 488-89. So the district court maintains full discretion over whether to enhance damages in cases of willful infringement. *Fla. Prepaid*, 527 U.S. at 663 n.15 (Stevens, J., dissenting) ("In the case of private infringement suits, treble damages are available only 'where the infringer acted in wanton disregard of the patentee's patent rights, that is, where the infringement is willful.' 'On the other hand, a finding of willful infringement does not mandate that damages be enhanced, much less mandate treble damages.'" (citations omitted)).

Petitioner also asserts that "Congress could not have envisioned" the current willfulness framework. Pet. 21. But the legislative history of the 1946 predecessor version of § 284 demonstrates that Congress understood awarding enhanced damages would require willful infringement. As explained above, courts had long enhanced damages for willful infringement. *See* Section II.B, *supra*. And Congress used the 1946 bill to codify that practice.[1]

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[1] "In the 1952 codification, §§ 67 and 70 of the 1946 Code were consolidated in the present § 284. The stated purpose was merely 'reorganization in language to clarify the statement of

Indeed, the legislative history of the 1946 predecessor version of § 284 shows that Congress understood full well that enhanced damages were warranted only for willful and bad-faith infringement. Representative Lanham explained that only willful infringement would merit these increased damages:

> Of course, in a case of innocent infringement, it is presumed that the court would assess no more than reasonable royalty for such time as the patent was infringed by the innocent user. . . . But if there has been a willful infringement, then the [increased] damages as set out in the bill can be collected.

Cong. Rec. H1857 (daily ed. Mar. 4, 1946). The Assistant Commissioner of Patents also testified that the bill would authorize enhanced or exemplary damages to punish willful infringement:

> I think that the rule that I have outlined and which I hope the courts will follow, would be only in those cases where there is no question about the validity of the patent and there is willful infringement with the deliberate attempt of capturing the market which has been established under the patent. I think the court would be fully

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the statutes.'" *See Aro*, 377 U.S. at 505 n.20 (quoting H.R. Rep. No. 1923, 82d Cong., 2d Sess., at 10, 29).

> justified in assessing exemplary damages in a case of that kind.

Recovery in Patent Infringement Suits: Hearing on H.R. 5231 Before the H. Comm. on Patents, 79th Cong 9-10 (1946) (statement of Mr. Conder C. Henry, Assistant Commissioner of Patents). In short, Congress understood that § 284 codified prior precedent recognizing the discretionary power of district courts to punish willful infringers.

Petitioner also relies on legislative history from the America Invents Act for support. Pet. 21-22. Petitioner claims that, in passing the act, Congress somehow overturned or expressed opposition to the current enhanced-damages test by not amending the statute to incorporate it. *Id.* Again, however, congressional debates tell the opposite story. Senator Kyl explained that "[t]he present bill appropriately leaves patent-damages law to common law development in the courts. The present bill also makes no changes to the standard for awards of treble damages." 157 Cong. Rec. S1374 (daily ed. Mar. 8, 2011). Senator Leahy similarly reasoned that "[t]he courts have been making good progress in developing the law [of damages], and I do not believe patent reform legislation should interfere with this progress." 157 Cong. Rec. S1050 (daily ed. Mar. 1, 2011). And Senator Feinstein noted her approval of the current state of affairs: "I also believe that if the bill remains silent on damages, as the managers' amendment would do, that no harm will be done to the value of patents, which is so important for

encouraging innovation." *Id.* Thus, contrary to Petitioner's claim, this legislative history suggests Congress did not disapprove of the current enhanced-damages test.

Although Congress did not amend § 284 to refer to "willful infringement," it added a different provision that acknowledged the willfulness standard. In 35 U.S.C. § 298, Congress barred proof of willful infringement by a failure to seek advice of counsel: "The failure of an infringer to obtain the advice of counsel with respect to any allegedly infringed patent, or the failure of the infringer to present such advice to the court or jury, may not be used to prove that the accused infringer willfully infringed the patent or that the infringer intended to induce infringement of the patent." Thus, in enacting § 298, Congress tacitly endorsed the current willfulness framework.

Petitioner further argues that the enhanced-damages test conflicts with *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 653 (1983). Pet. 22-23. Petitioner explains that *General Motors* examined a separate provision of § 284—prejudgment-interest awards—and held that the text gave district courts general authority to award prejudgment interest, despite a common-law background restricting the award to exceptional circumstances. Pet. 23; *Gen. Motors*, 461 U.S. at 653. Petitioner asserts that the enhanced-damages provision of § 284 should also be interpreted to allow district courts general authority

without restricting the award to willful infringement. Pet. 21-22.

But the *General Motors* opinion undercuts Petitioner's argument. This Court in *General Motors* explained that Congress created the prejudgment-interest section of § 284 from scratch; that section of § 284 was free of precedent. The Court explained that "[t]his is not a case in which Congress has reenacted statutory language that the courts had interpreted in a particular way. In such a situation, it may well be appropriate to infer that Congress intended to adopt the established judicial interpretation." *Gen. Motors*, 461 U.S. at 653.

Unlike the prejudgment-interest section of § 284 first enacted in 1946, *id.* at 652, the enhanced-damages section carries over a century of interpretive decisions. *See* Section II.B.2, *supra.* Thus, far from mandating a plain-text reading, *General Motors* supports Respondent's position: the enhanced-damages provision owes its meaning to precedent, rather than the text alone.

Petitioner's *Octane* arguments, Pet. 23-24, fail equally. In *Octane*, this Court held that the text of § 285 permitting the award of attorney's fees in "exceptional" cases should be interpreted literally. *Octane*, 134 S. Ct. at 1755-56. Petitioner argues, therefore, that § 284 should also be interpreted literally, without a willfulness requirement. Pet. 23-24. Like the prejudgment-interest provision in *General Motors*, however, Congress created § 285 attorney's fees awards fresh in the Patent Act of

1946. *Octane*, 134 S. Ct. at 1753. Before the act, the law "did not authorize the awarding of attorney's fees." *Id.* Because Congress first added a fee-shifting provision in 1946, that act did not incorporate prior Court precedents. The Court's purely textual reading of § 285 in *Octane* thus neither mandates nor suggests a similar reading for § 284, which has an extended prior history. Despite the numerical closeness and textual parallels between these two statutory sections, therefore, their statutory and judicial histories mandate individualized treatment.

III. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the petition.

Respectfully submitted,

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July 24, 2015

APPENDIX

2013-1668

United States Court of Appeals for the Federal Circuit

STRYKER CORPORATION, STRYKER PUERTO RICO, LTD., and STRYKER SALES CORPORATION,

Plaintiffs-Appellees,

v.

ZIMMER, INC. and ZIMMER SURGICAL, INC.,

Defendants-Appellants,

and

ZIMMER ORTHOPAEDIC SURGICAL PRODUCTS,

Defendant.

Appeal from the United States District Court for the Western District of Michigan in No. 10-CV-1223, Judge Robert J. Jonker.

REPLY TO DEFENDANTS-APPELLANTS' OPPOSITION TO PLAINTIFFS-APPELLEES' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFING

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Plaintiffs-Appellees, Stryker Corporation, Stryker Puerto Rico, Ltd., and Stryker Sales Corporation (collectively, "Stryker"), hereby respond to Defendants-Appellants' Opposition to Stryker's Motion for Leave to File Supplemental Briefing ("Opposition") (Doc. No. 52) as follows:

I. ARGUMENT

A. Zimmer's Opposition Confirms That Stryker's Motion For Leave Should Be Granted

In their Opposition to Stryker's Motion for Leave to File Supplemental Briefing, Defendants-Appellants, Zimmer, Inc. and Zimmer Surgical, Inc. (collectively, "Zimmer"), fail to offer a single substantive reason why Stryker's Motion should be denied. Instead, Zimmer responds directly to the Proposed Supplemental Brief that was attached as an exhibit to Stryker's Motion, even citing to specific pages of Stryker's Proposed Supplemental Brief in its Opposition. (Doc. No. 52 at 5, 6.) By arguing the points it would raise in a supplemental brief, Zimmer has effectively confirmed that Stryker's Motion should be granted.[1] Indeed, it would be unfair for this Court to consider Zimmer's

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[1] Zimmer filed its Opposition on June 18, 2014, six days late. (Doc. No. 52). Although Zimmer moved for a one-week extension of time (Doc. No. 49), this Court never ruled on that motion. Zimmer simply granted itself an extension of time.

substantive arguments on the merits without also considering the arguments raised in Stryker's Proposed Supplemental Brief.

Zimmer complains that, by attaching its Proposed Supplemental Brief as an exhibit to its Motion, Stryker somehow violated Federal Rule of Appellate Procedure 27's proscription that "[a] separate brief supporting or responding to a motion must not be filed." Fed. R. App. P. 27(a)(2)(C)(i) (emphasis added). However, the Proposed Supplemental Brief, which the Clerk's office instructed Stryker to include as an attachment to its Motion, is not a "separate brief supporting or responding to" Stryker's Motion for Leave. Stryker has not yet filed its supplemental brief but has merely proffered a Proposed Supplemental Brief to be filed when and if the Court grants its Motion. Accordingly, Stryker is not attempting to file additional substantive briefing without the Court's permission, but rather is doing exactly the opposite by affirmatively seeking the Court's permission to file supplemental briefing. And, contrary to Zimmer's representations, there is simply no rule barring a party from filing both a Rule 28(j) letter and a motion for leave to file supplemental briefing, as Stryker has done in this appeal. (Doc. No. 52 at 2-3.)

B. Zimmer Fails To Overcome Stryker's Strong Showing Of The Need For Supplemental Briefing

Stryker's Motion provides compelling reasons why this Court's de novo standard of review for objective willfulness, as set forth in *Bard Peripheral Vascular, Inc. v. W.L. Gore & Associates, Inc.*, 682 F.3d 1003, 1006-07 (Fed. Cir. 2012), cannot stand in light of the Supreme Court's decisions in *Highmark Inc. v. Allcare Health Management System, Inc.*, 134 S. Ct. 1744 (2014) ("*Highmark*") and *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014) ("*Octane*"), and why the parties should be allowed to file supplemental briefing on this issue. (Doc. No. 48.) In its Opposition, Zimmer fails to rebut these reasons and offers only a superficial analysis of the Supreme Court's decisions.

For instance, Zimmer states the obvious point that *Highmark* and *Octane* expressly pertain only to § 285 and attorneys' fees, not to § 284 and enhanced damages. (Doc. No. 52 at 3.) Stryker has never argued that these decisions directly overrule this Court's willfulness framework. Rather, Stryker maintains that *Highmark* and *Octane* beg the question of whether this Court's willfulness framework—particularly de novo review of the objective prong—is correct, an issue that should be explored more fully in supplemental briefing.

Moreover, Zimmer fails to adequately address the fact that this Court has long treated the analyses under § 285 and § 284 the same, instead summarily dismissing this key point in a footnote. (*Id.* at 5 n.1);

see Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc., 701 F.3d 1351, 1353 (Fed. Cir. 2012); *iLOR, LLC v. Google, Inc.*, 631 F.3d 1372, 1377 (Fed. Cir. 2011). Zimmer also fails to even acknowledge that several judges of this Court have outspokenly declared that *Bard* was wrongly decided as to § 284. *See, e.g., Highmark*, 701 F.3d at 1357 n.1 (Moore, J., joined by Rader, C.J., O'Malley, J., Reyna, J., Wallach, J., dissenting); *id.* at 1367 n.5 (Reyna, J., joined by Moore, J., O'Malley, J., Wallach, J., dissenting); *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 687 F.3d 1300, 1320-21 (Fed. Cir. 2012) (Mayer, J., dissenting-in-part). Both of these points underscore the need for further briefing in this appeal to address the impact of *Highmark* and *Octane* on the standard of review for willfulness.

Zimmer further offers a disjointed explanation as to why the willfulness inquiry cannot be divorced from an objective assessment of recklessness, but that argument is beside the point. (Doc. No. 52 at 3-5.) Stryker does not challenge on appeal the correctness of the two-prong, objective/subjective inquiry for willfulness set forth in *In re Seagate Technology, LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc) because Stryker prevailed on willfulness below even under the stringent standard set forth therein. Rather, Stryker submits that de novo review of the objective prong of willfulness under *Bard* would be improper. Therefore, Zimmer's citation to the Supreme Court's decision in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007) is completely inapposite to the issue for which Stryker seeks leave to file supplemental briefing—namely, the appropriate standard of review for the

objective prong of willfulness within the confines of the *Seagate* test.

Zimmer's discussion of *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993) ("*PRE*") also fails to bolster its position. (Doc. No. 52 at 5-6.) The following critical points are not in dispute: this Court relied on *PRE* to justify de novo review of objective willfulness in *Bard*,[2] *see* 682 F.3d at 1007-08; this Court also relied on *PRE* in extending *Bard*'s de novo review to the objective prong of the exceptional-case test, *see Highmark*, 687 F.3d at 1310 n.1; and, in *Octane*, the Supreme Court wholly rejected the application of *PRE* to the exceptional-case test, *see* 134 S. Ct. at 1757-58. At a minimum, *Octane* raises the question of whether *PRE* can still be used to support *Bard* as applied to willfulness now that it has been flatly rejected in the context of exceptional case. The parties should have the opportunity to address this point in supplemental briefing. Moreover, the fact that *Seagate* does not mention *PRE* is inconsequential, both because Stryker does not challenge *Seagate* and because *Seagate* says nothing about the appropriate

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[2] Zimmer attempts to downplay the Court's reliance on *PRE* in *Bard* by stating that "*PRE* was not the basis for the Court's holding." (Doc. No. 52 at 6 (emphasis added).) Nevertheless, Zimmer acknowledges that the *Bard* court "noted that its holding '[was] consistent with similar holdings in other parallel areas of the law,' including *PRE*'s sham litigation exception . . . " (*Id.*) Even if *PRE* was not the exclusive basis for the Court's holding in *Bard*, *PRE* unquestionably lent support to the holding.

standard of review for willfulness anyway. *See* 497 F.3d at 1371 ("We leave it to future cases to further develop the application of this [two-prong willfulness] standard.").

Zimmer further reinforces Stryker's position by citing *Bard*'s discussion of the proper allocation of decisionmaking among judicial actors. (*See* Doc. No. 52 at 6-7.) In *Bard*, this Court concluded that judges, rather than juries, are best suited to make objective willfulness determinations, but said nothing about the relative merits of the district court versus the appellate court. *See Bard*, 682 F.3d at 1006-07. In contrast, in *Highmark*, the Supreme Court expressly rejected the notion that this Court is more adept at making exceptional-case findings than district courts. *See* 134 S. Ct. at 1748-49; *see also Highmark*, 701 F.3d at 1356. The Supreme Court explained that the district court is "'better positioned'" because it "lives with the case over a prolonged period of time," thereby justifying deferential review of the district court's exceptional-case findings. *Highmark*, 134 S. Ct. at 1748-49 (quoting *Pierce v. Underwood*, 487 U.S. 552, 559-60 (1988)). The Supreme Court's reasoning applies equally well to willfulness, given that both the exceptional-case inquiry and the objective-willfulness inquiry turn on the strength and reasonableness of a party's litigating position as developed over the entire course of a trial. This Court should allow the parties to file supplemental briefing to address whether decisionmaking for willfulness should be allocated more heavily toward the district judge through deferential review, as it is now for exceptional case.

C. Supplemental Briefing Is Appropriate Even Though Stryker Should Prevail Under *Bard*'s De Novo Standard of Review

Although Stryker should prevail on the merits regardless of the standard used to review the district court's objective willfulness determination,[3] this appeal presents a unique opportunity for the Court to revisit *Bard* now that the Supreme Court has provided relevant guidance on a parallel issue in *Highmark* and *Octane*. Many judges of this Court already oppose *Bard*'s de novo standard of review. *See supra* at 4. And the Supreme Court has now ruled that deferential review is appropriate for inquiries like objective willfulness that implicate the district court's intimate familiarity with the parties' litigating positions. *See Highmark*, 134 S. Ct. at 1748-49. Accordingly, this Court should allow the parties to file supplemental briefing on this issue to promote greater clarity moving forward.

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[3] Zimmer has not appealed from the jury's and district court's findings of subjective willfulness. (Doc. No. 18 at 65-68).

II. CONCLUSION

For the reasons set forth above and in Stryker's Motion for Leave to File Supplemental Briefing (Doc. No. 48), Stryker respectfully requests that the Court grant Stryker's Motion for Leave to File Supplemental Briefing.

Dated: June 25, 2014 Respectfully submitted,

/s/ Gregory J. Vogler

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CERTIFICATE OF INTEREST

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Federal Circuit Rule 47.4, Stryker makes the following disclosures:

1. The full name of every party or amicus represented by me is:

Stryker Corporation; Stryker Puerto Rico, Ltd.; and Stryker Sales Corporation.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None.

4. The names of all law firms and the partners and associates that have appeared for the party or amicus now represented by me in the trial court or agency or are now expected to appear in this court are:

McAndrews, Held & Malloy, Ltd.: Gregory J. Vogler, Sharon A. Hwang, Deborah A. Laughton, Laura M. Personick, Justin J. Paul, and Caroline A. Teichner.

Miller Johnson: David J. Gass and D. Andrew Portinga.

Dated: June 25, 2014 /s/ Gregory J. Vogler
Gregory J. Vogler

Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that the foregoing REPLY TO DEFENDANTS-APPELLANTS' OPPOSITION TO PLAINTIFFS-APPELLEES' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFING was electronically filed using the Court's CM/ECF filing system. Counsel registered with the CM/ECF system were served by operation of the Court's CM/ECF system per Fed. R. App. P. 25 on June 25, 2014.

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